

No. 78-363

Supreme Court, U. S.  
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**In the Supreme Court of the United States**

OCTOBER TERM, 1978

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MICHAEL GRASSO, JR., PETITIONER

*v.*

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
THIRD CIRCUIT

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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**OPINION BELOW**

The judgment order of the court of appeals (Pet. App. A) is not reported.

**JURISDICTION**

The judgment of the court of appeals was entered on August 2, 1978. The petition for a writ of certiorari was filed on August 31, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTION PRESENTED

Whether the indictment should have been dismissed because of the prosecutor's alleged abuse of the grand jury process.

### STATEMENT

Following a bench trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on one count of mail fraud, in violation of 18 U.S.C. 1341.<sup>1</sup> He was sentenced to six months' imprisonment, followed by four and a half years' probation. The court of appeals affirmed (Pet. App. A).

1. The evidence showed that in December 1974 petitioner, a financial consultant who specialized in obtaining surety bonds for construction firms, was engaged by Allegheny Contracting Industries, Inc. to obtain a \$521,000 performance bond that was necessary to secure a construction contract between Allegheny and the Pennsylvania Department of Transportation (PennDOT). Petitioner succeeded in plac-

<sup>1</sup> Petitioner was acquitted on 33 other mail fraud counts, one count of participating in the conduct of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c), and one count of conspiring to commit the latter offense, in violation of 18 U.S.C. 1962(d). Co-defendant Morton Hulse was convicted on 16 mail fraud counts and on the two racketeering counts. He was sentenced to five years' imprisonment and a \$20,000 fine. The court of appeals affirmed. *United States v. Hulse*, No. 77-2576 (3d Cir. Oct. 17, 1978). Co-defendant Charles Schatzman pled guilty to two mail fraud counts at a separate proceeding and was sentenced to three years' probation and a \$1,500 fine. Co-defendants Ralph Puppo and Lloyd Davidson were acquitted on all counts.

ing the bond through the Hul-Mar Insurance Agency of Camp Hill, Pennsylvania, which wrote the bond on behalf of the Wisconsin Surety Company in December 1974. Allegheny paid petitioner \$15,000, of which \$6,000 was a premium for the bond and \$9,000 was a fee for his services (A. 164a-176a, 207a-208a, 698a, 824a).<sup>2</sup>

A problem arose, however, when PennDOT refused to accept one of the four companies reinsuring the bond because that company was not licensed in Pennsylvania (A. 698a).<sup>3</sup> Wisconsin Surety turned to petitioner for help in finding a substitute reinsurer. Wisconsin Surety's president prepared a new reinsurance document, termed an "offer and acceptance" (or an "O&A" in the insurance business). The O&A and a cover letter, both dated January 10, 1975, were then mailed to petitioner at the Mount Vernon Agency, Inc., 3001 North Fulton Drive, Atlanta, Georgia 30305 (A. 700a-703a, 1288a; Gov't Exh. 19, 19a). Petitioner agreed to locate another insurance company willing to execute the O&A and thereby accept part of the risk on the Allegheny bond. The transmission of the O&A and the cover letter to petitioner was the mailing alleged in the mail fraud count on which he was convicted.

<sup>2</sup> "A." refers to the joint appendix in the court of appeals.

<sup>3</sup> At the time the policy was written, Wisconsin Surety was not permitted to issue bonds in excess of \$52,000 due to its inadequate capitalization. As a result, it was necessary for Wisconsin Surety to reinsure the \$521,000 bond with four other insurance carriers to obtain adequate sources of indemnification (A. 696a-697a).

Shortly after the mailing, petitioner met with Daniel Culnen at petitioner's office in Miami, Florida. Culnen operated the C&H Insurance Agency of Bloomfield, New Jersey. Petitioner persuaded Culnen to execute the O&A on behalf of the Summit Insurance Company, even though petitioner knew Culnen's agency had been enjoined by a federal court from representing Summit (A. 371a, 376a, 381a-382a, 1264a-1265a). Culnen back-dated the instrument to make it appear that execution had occurred prior to issuance of the injunction (A. 411a). PennDOT received the executed O&A on January 16, 1975. The document bore the Summit seal and falsely represented that Summit had assumed a \$176,000 reinsurance risk on the Allegheny bond (A. 1305a, 1308a, 827a).

2. Following petitioner's conviction, the district court granted him a new trial on the basis of newly discovered evidence. The evidence presented at the retrial consisted primarily of stipulated testimony from the first trial (A. 1209a). Petitioner was again convicted on the single mail fraud count.

Before the retrial began, petitioner moved to dismiss the indictment for abuse of the grand jury process (A. 950a-952a). Specifically, petitioner alleged that the evidence before the grand jury failed to support the allegation in the indictment that the O&A was mailed to him on January 10, 1975. Petitioner also asserted that critical information, concerning the address to which the documents were

mailed, was not provided to the grand jury (A. 951a-952a).

In support of these claims, petitioner observed first that Daniel Culnen inaccurately testified to the grand jury that he executed the O&A on behalf of Summit in May 1974, rather than in January 1975, the date alleged in the indictment (A. 436a, 481a-482a). Although Culnen later discovered that his grand jury testimony was incorrect and reported the error to the prosecutor, he did not reappear before the grand jury to correct his mistake (A. 490a-491a, 504a).<sup>4</sup> In addition, a postal inspector's report issued in March 1976 stated that in January 1975 the Mount Vernon Agency was no longer located at 3001 North Fulton Drive, Atlanta, Georgia, the address to which the O&A was mailed, and that no forwarding address for the agency had been filed with the post office (A. 1198a). The prosecutor did not know of this report until the retrial, and consequently it was not furnished to the grand jury (A. 1079a).

The district court denied petitioner's motion to dismiss the indictment. The court also denied a subsequent motion that suggested an *in camera* review of the grand jury minutes (A. 10a, 1207a).

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<sup>4</sup> At trial Culnen explained that when he testified before the grand jury he was misled by the date that he placed under his signature on the O&A to make it appear that the O&A was executed on May 10, 1974, while he was still an authorized Summit agent (A. 480a-481a, 601a, 605a).

### ARGUMENT

1. Petitioner contends (Pet. 7-13) that the indictment should have been dismissed because it was not supported by the evidence before the grand jury. This argument is incorrect. Evidence adduced at trial demonstrates that, despite Culnen's erroneous testimony before the grand jury concerning the date he executed the O&A, the grand jury had more than enough evidence before it to support the allegation in the indictment that petitioner induced Culnen to execute the document in January 1975.

Most important among this evidence were the documents themselves. Both the O&A and the cover letter addressed to petitioner were dated January 10, 1975. As the markings on these documents indicate, they were both grand jury exhibits (A. 479a-481a, 826a, 827a). Petitioner completely disregards these critical materials, which alone were sufficient to justify the grand jury's charge regarding the date of the O&A's execution. Moreover, as petitioner concedes (Pet. 5-6), the president of Wisconsin Surety testified before the grand jury that he thought the O&A and cover letter were mailed to petitioner in January 1975 (A. 951a).<sup>5</sup>

<sup>5</sup> The Wisconsin Surety president and an officer of Allegheny testified at trial that petitioner was responsible for procuring the necessary bond for the PennDOT contract, and that his efforts on Allegheny's behalf occurred during the late fall and winter of 1974-1975. See, e.g., A. 84a, 171a, 693a, 698a. Petitioner was provided with a copy of the grand jury testimony of these witnesses, but he did not impeach their statements

The grand jury was thus presented with conflicting evidence concerning the O&A's execution date. It apparently did not credit Culnen's recollection on the subject, but instead resolved the conflict in favor of the documentary evidence and the testimony of Wisconsin Surety's president. This was a logical course for the grand jury to follow. Testimony by Culnen that he executed the O&A in January 1975 would have been tantamount to an admission that he participated in the fraud by acting as an agent for Summit when he lacked authority to do so. By naming Culnen as an unindicted co-conspirator (A. 61a), the grand jury evidenced its rejection of Culnen's testimony that he executed the O&A in May 1974. The O&A and cover letter, dated January 10, 1975, were mailed to petitioner, and officials of Allegheny testified before the grand jury that they spoke to petitioner when they were trying to obtain a surety bond in the fall of 1974. Taken together, these facts were sufficient to support the grand jury's decision to indict petitioner on the mail fraud count on which he was convicted.

Nothing in the record supports petitioner's assertion (Pet. 6, 12) that that count was drafted by an Assistant United States Attorney on the basis of Culnen's "off the record" statement after his grand

at trial concerning the timing of his bond procurement efforts. This omission strongly suggests that there was no inconsistency between the witnesses' grand jury and trial testimony. See *Costello v. United States*, 350 U.S. 359, 364-365 (1956) (Burton, J., concurring).

jury testimony. The indictment itself, signed by the grand jury foreman (A. 67a), indicates that the grand jury believed the O&A was executed in January 1975 and that petitioner was involved in the fraudulent transaction.<sup>6</sup>

Even if petitioner's claim were factually colorable, no relief would be warranted. *Costello v. United States*, 350 U.S. 359, 363 (1956), held that "[a]n in-

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<sup>6</sup> *Gaither v. United States*, 413 F.2d 1061 (D.C. Cir. 1969), on which petitioner relies (Pet. 8), is inapposite. In that case, it was fully established that the indictment was drafted by the Assistant United States Attorney and signed by the foreman, but that it was not considered by the other grand jurors who had heard the evidence. Here, there is no evidence that the grand jury was bypassed in the indicting process. *United States v. Estepa*, 471 F.2d 1132 (2d Cir. 1972), also does not aid petitioner. In *Estepa*, the court held that an indictment was defective where hearsay evidence was presented to the grand jury and the prosecutor misled the grand jurors into believing that they were receiving a firsthand account of the relevant events. The court also indicated that it would not sustain an indictment based on hearsay testimony where there is a high probability that the jury would not have indicted had eyewitness testimony been presented instead (*id.* at 1137). The court characterized its decision as a discretionary exercise of its supervisory authority, not prohibited by *Costello v. United States*, 350 U.S. 359 (1956) (471 F.2d at 1136). The Second Circuit has since limited the scope of its holding in *Estepa* to the precise circumstances of that case. See *United States v. Harrington*, 490 F.2d 487, 489 (2d Cir. 1973). Here, the indictment was not based on the hearsay testimony of a law enforcement officer, the nature of which was not revealed to the grand jury. Rather, the grand jury heard testimony from actual participants in the fraudulent scheme, and it examined the actual documents whose mailing formed the basis of the charge on which petitioner was convicted.

dictment returned by a legally constituted and unbiased grand jury, \* \* \* if valid on its face, is enough to call for trial of the charges on the merits." This holding was reaffirmed in *United States v. Calandra*, 414 U.S. 338, 345 (1974), where the Court said that "an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence \* \* \*." Accord, *Lawn v. United States*, 355 U.S. 339, 349 (1958). Petitioner does not contend that the indictment was either facially defective or returned by an illegally constituted grand jury. Accordingly, the district court did not err in refusing to dismiss the indictment and in declining to review *in camera* the evidence before the grand jury.

2. Petitioner also argues (Pet. 11-12) that the grand jury process was abused because the government allegedly concealed the postal inspector's report concerning the Mount Vernon Agency's change of address and failed to bring Culnen's erroneous testimony to the grand jury's attention. These contentions are without merit. As petitioner conceded at his second trial, the prosecutor was not aware of the existence of the postal inspector's report until the defense motion for a new trial was filed (A. 1079a). The Assistant United States Attorney thus could not have provided the report to the grand jury. In addition, despite petitioner's argument to the contrary (Pet. 12), the exculpatory value of this report is slim, as is reflected by the district court's conviction of petitioner at his second trial, after the report was

discovered. Even if the report had been presented to the grand jury, it would have done little to detract from the inference that petitioner, the addressee, actually received the O&A. The grand jury believed that Culnen executed the O&A in January 1975. Since the president of Wisconsin Surety testified that he mailed the document in unexecuted form, someone must have transmitted the document to Culnen. The logical assumption for the grand jury to make was that the person who performed that task was petitioner, the addressee of the January 1975 mailing.

Similarly, even if the prosecutor had reported the error in Culnen's testimony to the grand jury, this would not have assisted petitioner. Rather, it would only have resolved the conflict between Culnen's erroneous testimony and the other evidence tending to establish that the O&A was executed after its preparation and mailing in January 1975.<sup>7</sup> See *United States v. Bowers*, 534 F.2d 186, 193 (9th Cir.), cert. denied, 429 U.S. 942 (1976) (holding that a prosecutor's failure to notify the grand jury of a witness's perjury was harmless where the correct version of the testimony would not have exculpated the defendant).

<sup>7</sup> Petitioner's reliance (Pet. 11) on *United States v. Basurto*, 497 F.2d 781 (9th Cir. 1974), is misplaced. In that case the prosecutor was aware that perjured material testimony had been presented to the grand jury, and the court held that he had an obligation to apprise the grand jury of the perjury (*id.* at 785-786). Here, by contrast, correction of Culnen's erroneous testimony would not have tended to exculpate petitioner, and the prosecutor was simply unaware of the existence of the postal inspector's report.

Moreover, as the court of appeals held in *United States v. Guillette*, 547 F.2d 743, 753 (2d Cir. 1976), cert. denied, 434 U.S. 839 (1977), "where subsequent events merely cast doubt on the credibility of grand jury witnesses, due process does not require the prosecution to notify the grand jury of those events and seek a new indictment." See *Bracy v. United States*, 435 U.S. 1301 (1978) (Rehnquist, Circuit Justice);<sup>\*</sup> *United States ex rel. Almeida v.*

<sup>\*</sup> In *Bracy v. United States*, *supra*, defendants petitioned this Court for a stay on the ground that a grand jury witness committed perjury and the prosecutor failed to inform the defense and the district court when he learned of the perjury. In denying the application, Mr. Justice Rehnquist stated (435 U.S. at 1301-1302):

[I]t seems to me that applicants misconceive the function of the grand jury in our system of criminal justice \* \* \*. The grand jury does not sit to determine the truth of the charges brought against a defendant, but only to determine whether there is probable cause to believe them true, so as to require him to stand his trial. Because of this limited function, we have held that an indictment is not invalidated by the grand jury's consideration of hearsay, *Costello v. United States*, 350 U.S. 359 (1956), or by the introduction of evidence obtained in violation of the Fourth Amendment. *United States v. Calandra*, 414 U.S. 338 (1974). While the presentation of inadmissible evidence at trial may pose a substantial threat to the integrity of that fact-finding process, its introduction before the grand jury poses no such threat. I have no reason to believe this Court will not continue to abide by the language of Mr. Justice Black in *Costello*, *supra*, at 363: "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more."

*Rundle*, 383 F.2d 421, 424 (3d Cir. 1967) cert. denied, 393 U.S. 863 (1968). An indicted defendant has the opportunity for a full airing of all the facts at his trial. Once a valid indictment was returned, the Assistant United States Attorney was not required to apprise the grand jury of Culnen's corrections to his testimony or of the postal inspector's report. Viewed most favorably to petitioner, those items "merely cast doubt on the credibility" of the evidence already presented to the grand jury.

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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